IN THE

Supreme Court of the United States

OCTOBER TERM 1944

No. 264

GUARANTY TRUST COMPANY OF NEW YORK,
Petitioner,

against

GRACE W. YORK,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R 23-5) is not reported. The revised opinion of the United States Circuit Court of Appeals for the Second Circuit (R 56-107) is reported in 143 F (2d) 503.

JURISDICTION

The order and judgment of the Circuit Court of Appeals for the Second Circuit was filed June 29 1944 (R 108). The petition for a writ of certiorari was filed July 17 1944 and was granted on October 9 1944 (R 109) "limited to the first question presented by the petition for

the writ". The jurisdiction of this Court rests upon Judicial Code §240(a), 28 USC §347(a), as amended by the Act of February 13 1925.

QUESTION PRESENTED

In an equity case in a Federal court based on diversity of citizenship, is the court bound by the State statute of limitations held to govern like cases by the State courts?[1]

STATEMENT OF THE CASE

Respondent Grace W. York instituted this as a class action on behalf of $1,213,000 principal amount of an issue of $30,000,000 principal amount of notes of Van Sweringen Corporation dated May 1 1930 and matured May 1 1935, the summons and complaint having been filed January 22 1942 (R 1). This is a diversity case. Plaintiff is a citizen of Pennsylvania and defendant is a citizen of New York (R 2). Plaintiff owns $6,000 principal amount of the issue of notes which she claims to represent, having received them as a gift on April 19 1934 (R 2, 16).

The substance of the claim is that petitioner as trustee under a trust indenture executed by Van Sweringen Corporation on May 1 1930 did not properly protect assets of the debtor segregated in the possession of the debtor for the benefit of noteholders, in that the trustee about October 29 1931 sponsored an exchange offer made by the debtor,

[1] The questions presented by the petition were eight in number (pp. 6-7). Nos. 4-8 related to other questions of substantive law excluded from review under this writ. Nos. 2-3 related to variants of the first question (above stated). In discussing the first question in the following brief, we from time to time discuss the variants also.

and as creditor of the debtor's affiliates in respect of a bank loan permitted certain collateral for the loan to be released from the lien thereof in order to permit the making of the offer, which the respondent's donor did not accept (R 3-11).

The trust indenture under which plaintiff York's notes were issued is reprinted at pp. 75-105 of the record filed in this Court in *Eastman* v. *Guaranty Trust Company* upon application by the plaintiff in that case (also a noteholder under the indenture) for certiorari, which was denied 317 US 691 (October Term 1942, No. 516). (The record in the *Eastman* case [also referred to as the *Hackner* case] has been stipulated by the parties herein to be part of the record in this Court, R 16.) This trust indenture imposed certain duties and conferred certain powers on petitioner as trustee, but expressly limited its obligations and provided that it should not be liable for anything in connection with the trust except for its own "wilful misconduct" (Hackner record, p. 98). The petitioner as trustee was not given custody or possession of any *res*, and the notes were not made a lien on any assets (R 57, 143 F [2d] at 505).

In October 1930 petitioner, with other banks constituting a group, made large advances to two corporations affiliated with the obligor Van Sweringen Corporation, and controlled by the two Van Sweringen brothers personally. The collateral for these advances included the common stock of Van Sweringen Corporation. Petitioner's participation in these loans was motivated largely by its desire to protect the noteholders against a threatened default at that time (Hackner record, p. 21).

The grievance of plaintiff York is that in October 1931 petitioner consented to and assisted in a plan for exchange of the notes for 50 cents on the dollar in cash and delivery of 20 shares of the obligor's common stock against each

note. The reasons why petitioner approved this procedure as being in the interests of the noteholders are fully set forth in three affidavits filed in the *Eastman* case (Hackner record, pp. 15-49) and made a part of the York record (R 16). It is unnecessary for purposes of review in this Court to set forth these details.

The previous *Eastman* action had been brought in the District Court by a noteholder who had accepted the offer of exchange. That action was dismissed on the present petitioner's motion for summary judgment, *Eastman* v. *Morgan* 43 Fed. Supp. 637. The dismissal was affirmed by the Second Circuit Court of Appeals, 130 F(2d) 300. The author of the opinion in the instant case, Frank J., was a member of the Court which so affirmed the judgment of dismissal, but concurred in the affirmance on the question of damages only, holding in effect that a noteholder who had received by virtue of the offer, which petitioner as trustee sponsored, 53% of the face value of his notes was not injured by the petitioner's action (130 F[2d] at 303). The majority of the Court held in addition that there was no evidence of representations by the present petitioner to the plaintiff Eastman (the original action having been framed in deceit) and further that as a matter of law there was no breach of trust because no trust existed in the absence of a *res*. This Court denied certiorari, 317 U.S. 691; and denied rehearing of the application therefor, 317 U.S. 713.

York, the respondent herein, is the donee or assignee of a noteholder who did not accept the exchange offer. Her separate suit[2] against the petitioner was commenced Janu-

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[2]On May 22 1940 in alleged pursuance of Rule 15(a) of the Federal Rules of Civil Procedure the plaintiff in the *Hackner* case served a notice purporting to add York and Eastman as par-

ary 22 1942. The petitioner as defendant therein moved, before answer, for summary judgment on the basis of the prior decision on July 9 1943, which motion was granted by the District Court (R 23-5). The decision of the District Court was predicated on the prior decision of the Court of Appeals with respect to breach of trust, although the defense of limitations was also argued by the defendant.[3]

On appeal from the judgment of dismissal the Second Circuit Court of Appeals (Frank J. again participating but the other members of the Court being different) overruled the prior decision of the Court on substantially the same

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ties plaintiff. This notice was returned by the defendant on May 23 1940. In the opinion of the Second Circuit Court of Appeals dismissing the *Hackner* case for want of jurisdiction, it was held that Federal jurisdiction did not exist as to York, but that the notice on behalf of Eastman might be treated as the institution of a new suit by Eastman. *Hackner* v. *Guaranty Trust Company*, 117 F (2d) 95, certiorari denied 313 US 559. As to York the service of the notice on May 22 1940, whatever its effect under the Federal rules, did not for purposes of the New York Civil Practice Act §23 toll the statute of limitations, since the cause of action in the *Eastman* (Hackner) case was radically different from the cause of action in the *York* case. See opinion of Leibell, D.J. in the *York* case April 27 1942 at p. 5 of respondent York's petition in this Court for amendment of the record; and *Streeter* v. *Graham & Norton Co.*, 263 NY 39.

[3]While respondent argued that the defense of limitations is not available on the motion for summary judgment, because not "pleaded" (see brief in opposition to petition for certiorari herein, p. 11), the motion for summary judgment before answer is expressly permitted by Rule 56(b), and a motion before answer necessarily imports the right to obtain judgment upon any ground upon which it can be granted. *A. G. Reeves Steel Construction Co.* v. *Weiss* 119 F (2d) 472, 476, certiorari denied 314 US 677. The Court below proceeded on this theory in discussing the statute of limitations and the doctrine of laches.

record; held that a trust existed; and held that a trial was required as to the existence and extent of a possible breach of trust, and that no other substantive question in the record warranted an affirmance. On defendant's petition for rehearing and to amend the opinion, (R 35-53) the Court of Appeals received briefs from the parties, recalled the original opinion, and substituted a revised opinion (R 55). The petition for rehearing was denied (R 55). The revised opinion appears at R 56-107, 143 F(2d) 503.

With respect to the revised opinion of the Court of Appeals, the writ of certiorari permits argument here only of the question of limitations, which is treated in section 11 of the opinion, R 88, 143 F(2d) at 521. In addition the revised opinion of the Court of Appeals discusses or remits for consideration by the District Court upon a trial other questions of substantive law; such as (a) the existence of a trust upon the facts as to which other judges in the same Court had held there was no trust, (b) the motives of the petitioner as trustee, (c) the question of disclosure, (d) the effect of the exculpatory clause in the indenture, and other questions.

In connection with the revision of the opinion and the petition for rehearing one of the judges who had concurred in the original decision, A. N. Hand Cir. J. dissented, stating in part (R 104-6, 143 F [2d] at 529-31):

> "Upon reconsideration of this case on the petition for rehearing, I have become convinced that we seriously erred in our original decision . . . But aside from any question as to the merits of plaintiff's claim, I see no sufficient reason for not holding it barred by the New York statute of limitations . . ."

SPECIFICATION OF ERRORS

The error assigned, in so far as permitted to be reviewed by the present writ, is that the Circuit Court of Appeals failed to apply the New York statute of limitations which would have been applied by the New York courts to bar the claim.

SUMMARY OF ARGUMENT

1. The New York statute of limitations is completely determinative of this action.

2. The New York statute of limitations as applied by the New York courts to like actions brought in equity is part of the substantive law of New York which must be applied by Federal courts of equity in New York in diversity suits.

3. The doctrine of "remedial rights" invoked by the Court below to avoid application of the New York statute of limitations rests upon an erroneous construction of the Judiciary Act of 1789 and upon authorities subsequently overruled by this Court.

I

The New York statute of limitations is completely determinative of this action.

The New York Civil Practice Act §48 subd. 3 (prior to the amendment thereof effective September 1 1936 which reduced the period to three years and transferred the provision to §49) provides, so far as material:

"The following actions must be commenced within six years after the cause of action has accrued. . . .

3. An action to recover damages for an injury to property, or a personal injury, except in a case where a different period is expressly prescribed in this article. . . ."

The term "injury to property" is defined by the General Construction Law §25a as "an actionable act, whereby the estate of another is lessened, other than a personal injury, or the breach of a contract."

New York Civil Practice Act §53 provides:

"An action, the limitation of which is not specifically prescribed in this article, must be commenced within ten years after the cause of action accrues."

Section 11 of the Civil Practice Act provides that the periods of limitation prescribed by the article relating to limitations "must be computed from the time of the accruing of the right to relief by action" to the time when the claim to relief is actually interposed by the plaintiff.

Section 10, contained in the same article of the Civil Practice Act, provides:

"*The provisions of this article apply and constitute the only rules of limitation applicable to a civil action* or special proceeding, except in one of the following cases:

1. A case where a different limitation is specially prescribed by law or a shorter limitation is prescribed by the written contract of the parties.

2. A case where the time to commence an action has expired when this article takes effect." (Italics ours.)

Since about 1848 the scheme of statutory limitations introduced into New York law by the Field Code has been complete and exclusive. As was said by the Court of Appeals in *Gilmore* v. *Ham* 142 N. Y. 1, 6:

> "Under the law of this state there is a fixed limitation for every cause of action, whether legal or equitable. After attaching suitable limitations to numerous classes of actions the Code adds (§388): 'An action, the limitation of which is not specially prescribed in this or the last title, must be commenced within ten years after the cause of action accrues.' This provision, in the Code of 1848 and continued since, has done away with the old rules as to cases cognizable only in courts of equity, and subjected all alike to some statutory limitation. (*De Pierres* v. *Thorn*, 4 Bosw. 288, 289; *Loder* v. *Hatfield*, 71 N. Y. 104.) So far as I have examined the authorities in this state since the adoption of the Code I have found no denial of the application of its provisions to any form of equitable action, unless cases of a continuing right, accruing newly every day, may be said to form an exception (*Miner* v. *Beekman*, 50 N. Y. 343; *Schoener* v. *Lissauer*, 107 id. 117), although it is quite apparent that they are not inconsistent with the uniform and universal rule."[4]

The result is that the ancient equity principle of laches, which was nothing but a device of the chancellor to remedy

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[4] *Gilmore* v. *Ham* has since been cited with approval in *Ford* v. *Clendenin*, 215 N. Y. 10, 16 (1915) and *Hanover Fire Insurance Co.* v. *Morse Dry Dock & Repair Co.* 270 N. Y. 86, 89 (1936).

inequity created by lapse of time in connection with stale claims, has in New York been superseded with respect to every type of application except those which appeal to the grace or discretion of the chancellor. These are subject to be cut down to periods shorter than the ordinary period of limitations, by reason of equitable considerations of laches, as pointed out in *Groesbeck* v. *Morgan* 206 N. Y. 385, 389.[5]

Thus a complete statutory framework subsisting in New York since approximately the date of *Swift* v. *Tyson* 16 Pet. 1, excludes the equitable considerations of laches from calculations of the lapse of time with respect to defenses against claims of right, even though undue delay may within shorter periods of time bar applications to the favor or discretion of the court. Moreover, the New York court has made it clear that as between the six-year and the ten-year statutes of limitation the plaintiff cannot acquire the benefit of the ten-year period by casting his claim in an equitable form if he could obtain a complete remedy at law. In *Keys* v. *Leopold* 241 NY 189 the court held that the six-year limitation applied to an action by a customer against a broker with respect to the proceeds of her account, saying (p. 192):

> "The mere fact that this is an action for an accounting is not determinative of this question. When a legal and an equitable remedy exists as to the same subject-matter, the latter is under the control of the same statutory bar as the former. (*Rundle* v. *Allison*, 34 N. Y. 180.) Nor is the fact that the defendants received this money in a fiduciary capacity and may, therefore, hold it under such a trust as the law may imply for the purposes of justice. (*Mills* v. *Mills*, 115 N. Y. 80.)"

[5] See also *Calhoun* v. *Millard* 121 NY 69, 82. *Cf. Patterson* v. *Hewitt* 195 US 309, 319; *Alsop* v. *Riker* 155 US 448, 460-1.

The obverse of the rule appears in *Hanover Fire Insurance Co.* v. *Morse Dry Dock & Repair Co.* 270 NY 86, 90, which applied the ten-year statute with respect to an action to reform insurance policies on the ground that they were obtained by fraudulent concealment; the court held that the insurers' right in equity to reform the policies did not correspond to any right on their part at law to recover damages for fraud since they had suffered no damage, and that the right to interpose the defense of fraud in a subsequent action by the insured on the policies was not the equivalent of a right by the insured to proceed at law. Where, however, the essence of the action is one to obtain relief on a ground specified in the Civil Practice Act, such as those of §48, extraneous allegations of fraud will not persuade the New York court to apply some other period of limitations, since with respect to limitations that court looks "for the reality and the essence of the action and not its mere name". *Brick* v. *Cohn-Hall-Marx Co.* 276 NY 259, 264.

Although derivative and representative actions are an established head of equity jurisdiction in New York and such an action by a minority stockholder belongs to the corporation (*Flynn* v. *Brooklyn City R. Co.* 158 NY 493, 508), the New York courts consistently apply the six-year statute of limitations to derivative actions where the corporation, if it were the plaintiff, could have recovered at law.

Potter v. *Walker* 276 NY 15;

Singer v. *Carlisle* 26 NYS (2d) 172, affirmed 261 AD 897, appeal denied 285 NY 863;

Kalmanash v. *Smith* 291 NY 142, 159;

Corash v. *Texas Company* 264 AD 292;

Dunlop's Sons, Inc. v. Spurr 285 NY 333;
Cwerdinski v. *Bent* 281 NY 782;
Goldstein v. *Tri-Continental Corporation* 282 NY 21;
Hastings v. *Byllesby & Co.* 293 NY 413, 417.

In the *Dunlop* case, where the corporation had paid $95,500 for a plant purchased by it from a director who had paid therefor $80,500, the plaintiff stockholder demanded an accounting from this director for profits, and on this basis the Special Term applied the ten-year statute of limitations. The Appellate Division however said in reversing (259 AD at 235):

> "What we have in this case is a claim for the return to the corporation of a loss suffered by the corporation. The amount of the loss is the same as the amount of the so-called 'profit' received by the defaulting officers and directors. The wrong done to the company is no different from the wrong done to a corporation when an excess salary is paid to an officer or when gifts are made to strangers or when bonuses are wrongfully paid. The exact amount of the loss is known.[6] Though the pleader may call this loss to the corporation a 'profit' to the unfaithful fiduciary which ought to be 'accounted for,' the pleader's characterization of the resulting legal situation with the intention of producing the application of a particular Statute of Limitations

[6] Where, however, the exact amount of the loss is not known, the same rule is applied. *Cwerdinski* v. *Bent* 281 NY 782, involving alleged excessive payments under a corporate bonus plan for the determination of which an accounting of the entire corporate income would be required.

> is not binding in any way on the court. The wrong pleaded is not a claim for profits in the sense in which that term is properly used in stockholders' actions."

The Court of Appeals affirmed.

In the *Singer* case, the Special Term (affirmed without opinion by the Appellate Division) held that defendant directors and third parties were entitled to the six-year statute of limitations with respect to a claim that they had conspired to divert to the third parties underwriting profits which belonged to plaintiff's corporation. The Court said (26 NYS [2d] at 177), after quoting the above language from the *Dunlop* case:

> "In the same way, any monetary benefits which the defendants obtained to the exclusion of the United Corporation represent merely the losses occasioned to the corporation and the moneys which the corporation would have received but for the defendants' improper neglect of their duty to obtain the underwriting business. Despite the fact that the defendants would be entitled to credit for their expenses in connection with the business which the United Corporation subsidiary should have had, the amount of the corporation's loss in respect to each transaction is definite and ascertainable in an action at law. In its nature and effect the claim is one for money damages at law."

Even if the third-party defendants as bankers received some benefit, the action continued to be one for waste or negligence, subject to the bar of the six-year statute, in the opinion of the Court in *Singer* v. *Carlisle*. See also to the same effect *Lyon* v. *Holton* 172 Misc 31, 35, affirmed

259 AD 877, modified in other respects and affirmed 286 NY 270.

Unquestionably the nature of the respondent York's claim is for loss sustained by her by reason of the negligence and misfeasance of petitioner as trustee. The extensive analysis of the facts made by the majority in the Circuit Court (R. 64-7, 82, 143 F [2d] at 509-11, 518) makes clear that plaintiff's claim, as conceived by that Court, is based upon petitioner's having occasioned a money loss to *non-accepting* noteholders[1], whether on the ground of negligence, inadequate disclosure, or adverse interest. The Court below found that petitioner did not actually receive any profits, although finding that it allowed an affiliate of the debtor to obtain moneys that might not otherwise have been obtained and although finding that petitioner might have had an expectation of profit (R 68, 143 F. [2d] at 511). In other words, the plaintiff York's claim, even as envisaged by the Court below in outlining the possibilities upon which a trial court might act, is formulated as a claim recoverable at law for money damages. That the six-year statute of limitations would be applied by the New York courts to actions of this character is apparent not only from the authorities above cited but from those which hold that actions at law may be brought against indenture trustees for damages resulting from misconduct on their part in the performance of trust duties. *Savings Bank of New London* v. *New York Trust*

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[1] *Accepting* noteholders were held in the prior case (43 F Supp 637, affirmed 130 F [2d] 300, certiorari denied 317 US 691) to have suffered no loss at all. This apparently remains the view of the judges who participated in the instant case, with reference to *accepting* noteholders (see R 69, 82).

Co. 27 NYS (2d) 963 (suit against indentture trustee); *Ansbacher* v. *New York Trust Co.* 280 NY 79 (suit against indenture trustee). See also *Empire Square Realty Co.* v. *Chase National Bank* 181 Misc 752, affirmed 267 AD 817, leave to appeal denied by the Court of Appeals in April 1944.

Moreover, application of the New York six-year statute of limitations to actions in equity is familiar to the Federal courts in New York. *Michelsen* v. *Penney* 135 F [2d] 409, 414-5 (CCA 2, 1943); *Winkelman* v. *General Motors Corporation* 44 F Supp 960, 967; *Goldboss* v. *Reimann* 55 F Supp 811, 819, affirmed 143 F (2d) 594 (CCA 2 1944, adopting the opinion of Bright, D.J. below); *Shultz* v. *Manufacturers & Traders Trust Co.* 128 F [2d] 889, 896 (CCA 2, 1942), certiorari denied 317 US 674[8].

In her brief in opposition to certiorari (p. 12) respondent cited as supporting application of the ten-year statute of limitations in a derivative action an opinion of Special Term in *Heller* v. *Boylan* 29 NYS (2d) 653, 699. But respondent omitted to note that on application for reargument this portion of the opinion was withdrawn by the Court (pp. 703-4). Respondent also cited a decision of Special Term in *Turner* v. *American Metal Co.* 36 NYS (2d) 356, which was subsequently reversed on other grounds in 50 NYS (2d) 800. The opinion of the Appellate Division there reported stated that the ten-year statute, by which the Court held the claim to be barred, applied to an action to impress

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[8]Frank J. who concurred with a separate opinion in the case cited, rejects the application we here make of it, with a statement that "those portions of our opinion were in no way necessary to the decision, and we do not feel bound by them here. . . ." (footnote 48a at R 99, 143 F [2d] at 527).

a constructive trust upon specific property. This, as has been shown, is not the present case.

But even if the present action were to be deemed one cognizable exclusively in equity (as this Court held a remedy under the Federal Farm Loan Act to be, *Russell* v. *Todd* 309 US 280), nevertheless it would seem clear that the lapse of more than ten years between the close of the exchange offer on December 15 1931 and the institution of this action on January 22 1942 completely barred the suit under the express provisions of Civil Practice Act §§10 and 53. Judge A. N. Hand in the Court below held the action barred by the ten-year statute, Civil Practice Act §53 (R 106, 143 F [2d] at 531). The majority, while accepting arguendo petitioner's contentions as to the statute of limitations under New York law, held that intervening "equitable considerations" forbade or might forbid application of the statute as it would be applied in the law of New York.

II

The New York statute of limitations as applied by the New York courts to like actions brought in equity is part of the substantive law of New York which must be applied by Federal courts of equity in New York in diversity suits.

Although the statute of limitations destroys the remedy without impairing the right (*Lightfoot* v. *Davis* 198 NY 261), it yet remains a part of substantive law both because the defense of limitations is determinative of an action and because it is rooted in sound and well-established public policy. In Roman law the principle goes back to the Insti-

tutes of Gaius, and in the English law to 21 Jac. 1. c. 16 (1623). In 1702 the Court of Kings Bench described the statute of limitations as that "on which the security of all men depends". *Green* v. *Rivett* 2 *Salk.* 422. The New York courts emphasize the practical considerations applied to the administration of justice which demand that legal disputes be settled while evidence is readily obtainable, and point to the public interest in the outlawing of stale claims. *Brooklyn Bank* v. *Barnaby* 197 NY 210, 227; *Schmidt* v. *Merchants Despatch Transportation Co.* 270 NY 287, 302. In *Bell* v. *Morrison* (1828) 1 Pet. 351, 360, Mr. Justice Story characterized the statute of limitations as

> ". . . . a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demands, after the true state of the transactions may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses. It has a manifest tendency to produce speedy settlement of accounts, and to suppress those prejudices which may rise up at a distance of time, and baffle every honest effort to counteract or overcome them."

This view has been again and again reiterated in this Court. See particularly *Campbell* v. *Haverhill* 155 US 610, 617; *United States* v. *Oregon Lumber Co.* 260 US 290.

The running of limitations thus constitutes an infirmity in the barred claim which accompanies it through every assignment, and prevents suit thereon by the assignee even though he be the local sovereign. *United States* v. *Buford* 3 Pet. 12, 30; *King* v. *Morrell* 6 *Price* 24, 28, 30; *Guaranty*

Trust Company v. *United States* 304 US 126. With reference to the considerations of public policy which permit assertion of the statute of limitations even against a friendly foreign sovereign, this Court said in the case last cited (p. 136):

> "The statute of limitations is a statute of repose, designed to protect the citizens from stale and vexatious claims, and to make an end to the possibility of litigation after the lapse of a reasonable time. It has long been regarded by this Court and by the courts of New York as a meritorious defense, in itself serving a public interest. [Citations] Denial of its protection against the demand of the domestic sovereign in the interest of the domestic community of which the debtor is a part could hardly be thought to argue for a like surrender of the local interest in favor of a foreign sovereign and the community which it represents."

In respect of the function it performs, the statute of limitations based upon the act of James I has exactly the same quality as the equitable defense of laches. In the case of laches as in that of limitations the dominant consideration is the wrong done the adverse party by delay; the only difference being that in the case of laches the ascertainment of the wrong rests upon an *ad hoc* determination of the chancellor, while in the case of limitations it is a generalized determination by the legislature of the forum. As this Court recently said in *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.* 321 US 342, 348:

> "*Statutes of limitation, like the equitable doctrine of laches,* in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber

until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the *right to be free of stale claims* in time comes to prevail over the right to prosecute them." (italics supplied)

See also *Menendez* v. *Holt* 128 US 514, 523; *Galliher* v. *Cadwell* 145 US 368, 371; *Hammond* v. *Hopkins* 143 US 224, 250. Rule 8 of the Federal Rules of Civil Procedure as approved by this Court pursuant to the Act of June 19 1934, 48 Stat. 1064, provides in subdivision (c) for the pleading of affirmative defenses, including laches and limitations among others. The Rules say nothing as to what the contents of these defenses shall be. Evidently this Court considered that laches and limitations, like the other defenses specified, were matters of substantive law which in diversity cases are controlled by the law of the State of the forum.

In other words, the New York statute of limitations which excludes equitable considerations from any computation of the lapse of time, is nothing but the fixed equivalent as determined by the legislature, of the various lapses of time which the chancellor was wont to calculate for particular cases as determinative of rights in equity. In the courts of New York, it is clear, no litigant can prolong the term granted him by the law for the commencement of an action on his claim by invoking the "equitable principles" which the majority below would import into the New York statute (R 98, 143 F[2d] at 527). Delay in the accrual of a cause of action is indeed provided by New York law

through a formula of its own, clearer and more limited than the old conception of "equitable principles", in the shape of fraud defined by the cases as the equivalent of common law deceit.[9] But that is the limit of any variation which New York law permits on the basis of equitable principles.

Hence it is obvious that the decision below, which assumes to extend the six-year or the ten-year period of limitations fixed by the legislature of the forum, through concepts of "inequitable conduct" not recognized in the State courts for any such purpose, is a plain deviation from the substantive law of the forum. It opens to litigants in the Federal courts loopholes in the defense of limitations which do not exist in the State courts and, by reason of the determinative nature of this defense, will make the choice of jurisdictions decisive for certain types of claim. Through these loopholes will reappear the very evils which the rule of *Erie R. Co.* v. *Tompkins* 304 US 64 was intended to obviate, as is clearly pointed out by Judge A. N. Hand in his dissent (R. 107, 143 F[2d] at 531) and

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[9]Civil Practice Act §48, subd. 5, in connection with which see *Cohen* v. *City Company* 283 NY 112, 117; *Brick* v. *Colm-Hall-Marx Co.* 276 NY 259, 264-5; *Carr* v. *Thompson* 87 NY 160; *Druckerman* v. *Harbord* 31 NYS (2d) 867, 870. These cases establish that subd. 5 governs only when actual, not constructive, fraud is the gravamen of the action. The *Druckerman* case (inadequately presented at pp. 14-5 of respondent's brief in opposition to certiorari) specifically referred in this connection to the requisites of common law deceit as set forth in *Reno* v. *Bull* 226 NY 546. Clearly fraud is not the gravamen of the York complaint. The former plaintiff Eastman did formulate her claim as one in deceit, and it was in this form that the original claim was dismissed on summary judgment (43 F Supp 637, 130 F [2d] 300, certiorari denied 317 US 691), for the reason in part that Eastman's own testimony on deposition showed that she had no basis for a claim of fraud against the petitioner as trustee.

by Moore's Federal Practice in its note on the case (Vol. 1, 1944 Supp. p. 408-10).[10] Litigants will thus be again in the situation where

> ". . . the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side" (*Klaxon Co.* v. *Stentor Co.*, 313 US 487, 496);

and in the old "inadmissible" position

> ". . . that there should be one rule of state law for litigants in the state courts and another rule for litigants who bring the same question before the federal courts owing to the circumstance of diversity of citizenship" (*Fidelity Trust Co.* v. *Field*, 311 US 169, 180).

The innovation introduced into the New York law by the decision below with reference to the statute of limitations is vividly illustrated by that decision itself. All the acts complained of by the plaintiff York took place in 1931, between October 29 when the offer of exchange of Van Sweringen Corporation notes was made and December 15 when it expired (R 65, 76). This action was commenced more than ten years later, on January 22 1942 (R 1). Even at that late date the view of the Second Circuit Court of Appeals as expressed on the basis of substantially the same record here presented (*Eastman* v. *Guaranty Trust Company* 130 F [2d] 300, August 4 1942) was that no trust existed and that there had been no breach of trust by the

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[10]Moore's note concludes: "A state statute of limitations is an embodiment of a substantial rule of policy, and there is no reason why it should be applied in a law action and flaunted in an equity suit. To hold otherwise invites litigants to jockey for position in the federal courts."

present petitioner. That view was reversed in the instant case in 1944 largely on the basis of two other holdings in the interval (R 70). The petitioner was remitted to a trial with respect to its possible breach of trust, which trial will turn in great part on proof now to be taken on *real estate valuations and stock valuations as they stood some 13 years before the decision* (see discussion by the majority at R 73-80, 143 F [2d] at 514-7).

The expense and trouble to which the trustee will be put by a trial of this type of issue in this condition of staleness, immediately suggests itself, and occurred to the Court below. It is this very kind of thing which the policy of limitations is directed against. The explanation given by the Court below, however, is interesting. The majority says that the trustee could have caused liquidation of the debtor in 1931, and probably also liquidation of the debtor's subsidiary; that a substantial recovery on a claim against the subsidiary "might have resulted"; that this recovery might perhaps not have yielded the noteholders an amount equal to that available to them under the plan of exchange sponsored by the trustee, but that on the other hand it might have, "although apparently the trustee did not think so"; that "no one now can estimate with any high degree of accuracy" what the recovery might have been; but that if the trustee wrongfully failed to bring about the liquidation, it cannot avail itself of the difficulty of proof, because the "wrong-doer" must take the risk of the uncertainty (R 81, 143 F [2d] at 517). Thus the "wrong-doer" is assumed to be a wrong-doer for the purpose of putting him to the burden of proof which the Court, 13 years after the event, now determines (one judge dissenting and two judges in the same Court of the contrary opinion) to be indispensable to clear himself of the pre-

sumption of his being a wrong-doer. This manner of reasoning vividly recalls Selden's view of equity as "a roguish thing."[11] No wonder that the concept of laches to be measured by equitable standards of this character, has ceased to be part of the law of New York.

While we do not know any decision in this Court since 1938[12] holding the statute of limitations to be a part of substantive law (apart from the clear intimation in *Russell v. Todd*, see at pp. 52-3 below), this Court has in various comparable situations applied the standard of *Erie R. Co. v. Tompkins*.

Cities Service Oil Co. v. *Dunlap* 308 US 208 (burden of proof);

Klaxon Co. v. *Stentor Co.* 313 US 487 (conflict of laws);

Palmer v. *Hoffman* 318 US 109, 117 (contributory negligence);

American Seating Co. v. *Zell* 322 US 709 (parol evidence rule).

In *Cities Service Oil Co.* v. *Dunlap*, which is cited with approval in *Palmer* v. *Hoffman*, this Court held that the Fifth Circuit Court of Appeals had offended against the doctrine of *Erie R. Co.* v. *Tompkins* by declining to follow

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[11] *Table Talk of John Selden* (ed. Pollock 1927), p. 43: "Equity in law is the same that the spirit is in religion, whatever one pleases to make it. . . . Equity is a roguish thing, for law we have a measure [and] know what to trust to. Equity is according to the conscience of himself that is chancellor, and as that is larger or narrower so is equity. It is all one as if they should make the standard for the measure we call a foot to be the chancellor's foot. . . ." etc.

[12] For holdings by this Court on the point prior to 1938 see the discussion at p. 40 below; particularly *Dupree v. Mansur* 214 US 161.

the rule of the Texas courts prescribing how and by whom the facts should be shown where one party to a contest concerning ownership of land claims the legal title as bona fide purchaser. The action was one to remove a cloud on title, and the question of the proper rule as to burden of proof arose on respondents' cross-bill. Plaintiff denied the allegations of the cross-bill and claimed to be a bona fide purchaser for value without notice.

On an issue of this character, under the laws of Texas, the burden of proof is on the party who attacks the legal title. The Fifth Circuit Court of Appeals acknowledged this to be the law of Texas but felt entitled to apply a different rule which it deemed better, because the Circuit Court believed the issue to be one merely of practice and not of substantive law. In the words of the Circuit Court (quoted in 308 US at 212),

> "This seems to us a matter of practice or procedure and not a matter of substantive law. There is no question as to what are the rights of a bona fide purchaser, or as to whether the facts established make complainant out such, but only a question of how and by whom the facts shall be shown to the court. Such matters are not within the decision in *Erie R. Co.* v. *Tompkins*, and the cases following it.
>
> . . . The question is simply what is the proper practice in courts of equity. The practice followed in the State courts of Texas, where equity courts as such do not exist, is not controlling."

In reversing the Circuit Court, this Court said in a unanimous opinion (p. 212):

> "We cannot accept the view that the question presented was only one of practice in courts of

> equity. Rather we think it relates to a substantial right upon which the holder of recorded legal title to Texas land may confidently rely. Petitioner was entitled to the protection afforded by the local rule. In the absence of evidence showing it was not a bona fide purchaser its position was superior to a claimant asserting an equitable interest only."

If this is so on questions of burden of proof and the other types of question dealt with in the late decisions above cited, we submit there can be no doubt that the statute of limitations, which is so firmly rooted in local public policy and which, in contrast to the rule as to burden of proof, is made by local law determinative in all cases where it applies, is a part of the body of local substantive law contemplated by *Erie R. Co.* v. *Tompkins*.

III

The doctrine of "remedial rights" invoked by the Court below to avoid application of the New York statute of limitations rests upon an erroneous construction of the Judiciary Act of 1789 and upon authorities subsequently overruled by this Court.

Disregard by the Circuit Court of the New York statute of limitations applicable to this case, rests upon a doctrine of what is called "equitable 'remedial rights' ", explained and discussed at length in the opinion below (R 88-101, 143 F [2d] at 521-28). The conclusion seems to be based essentially on a case which we believe to be overruled (*Kirby* v. *Lake Shore etc. R. Co.* 120 US 130) and on a case which we suggest the Court below has misunderstood (*Russell* v. *Todd* 309 US 280); but for a full appreciation

of the argument of the majority below and for a realization of the extent to which decisions and dicta of this Court intermediate between 1842 and 1938 may still be deemed to be law in respect of the question here presented, it is necessary to analyze closely the 35 cases in this Court which have been referred to as illustrating the scope and nature of the Federal equity jurisdiction.

We begin with the theory advanced herein by the Second Circuit Court of Appeals.

A. Theory of the Court Below.

Of the 35 cases dealt with below, some 28 are referred to in the opinion of the Second Circuit Court of Appeals. That opinion proceeds on the theory that there exists a rule of "equitable 'remedial rights'" as to which Federal equity jurisdiction has been and continues (notwithstanding *Erie R. Co.* v. *Tompkins*) to be independent. The majority trace this doctrine back to "Chief Justice Marshall's opinion in *Robinson* v. *Campbell* 3 Wheat. 212",[13] and say that from the date of that decision (1818) a Federal equity court exercising jurisdiction based on diversity of citizenship, was not obliged to apply State law "with respect to equitable 'remedial rights'". The majority hold that, while as to substantive rights the line of decisions based on *Swift* v. *Tyson* 16 Pet. 1 (1842) permitted the Federal courts in diversity cases to follow an independent line with reference to questions of "general law", this rule rested

[13]See R. 89. Chief Justice Marshall did not write the opinion in *Robinson* v. *Campbell*, which was written by Todd, J. The majority below probably had in mind *U. S.* v. *Howland* in which Chief Justice Marshall did write the opinion and as to which see p. 31 below.

on an interpretation of the Rules of Decision Act, Judiciary Act of 1789 §34, 28 USC §725, and that the independence of the Federal equity jurisdiction with respect to "remedial rights" was and is an entirely separate matter. Therefore, so reasons the majority, the destruction of the rule of *Swift* v. *Tyson* by the decision in *Erie R. Co.* v. *Tompkins* (1938), left intact the separate rule as to the independence of equity courts as regards "equitable 'remedial rights' ", more particularly as that doctrine rests on Judiciary Act §11, 28 USC §41 (1). The opinion below continues with the argument that "for the purposes of this doctrine [of equitable remedial rights]" State statutes of limitation are to be regarded in the Federal courts as affecting not substantive rights but these "equitable 'remedial rights' ". As authority for this conclusion the majority below cite *Kirby* v. *Lake Shore etc. R. Co.* 120 US 130 (Harlan J., 1887). As contravening the argument made below that the rationale of the *Kirby* case had been destroyed by *Erie R. Co.* v. *Tompkins*, the majority find support in this Court's decision in *Russell* v. *Todd* 309 US 280 (Stone J., 1940), pointing to the phrase "when consonant with equitable principles" in the Court's projection of the historical background (309 US at 288) and to a footnote at the bottom of page 288 (see R. 93, 143 F [2d] at 524). The majority also derive support for their analysis of the situation from the fact that Brandeis J. and Holmes J., who were known to have disapproved the doctrine of *Swift* v. *Tyson*, and the former of whom wrote the opinion in *Erie R. Co.* v. *Tompkins*, identified themselves with the opinions of this Court in three cases ante-dating 1938 (*Pusey & Jones* v. *Hanssen* 261 US 491; *Guffey* v. *Smith* 237 US 101; and *Benedict* v.

New York 250 US 321), which the majority below construe as supporting the doctrine of "equitable 'remedial rights' ".

From their analysis of these and other decisions, the majority arrive at the conclusion (R 100, 143 F [2d] at 528):

> "It follows that, while we are bound by the interpretation which New York decisions give to the trust indenture, we are not required to apply the New York statute of limitations if there are strong countervailing equitable considerations."

For the purposes of this conclusion the Court accepted arguendo our interpretation of the New York decisions as excluding such equitable considerations from the operation of the statute (R 88-9, 143 F [2d] at 521), the correctness of which interpretation has been demonstrated at pp. 7-16 of this brief.

B. Analysis of Authorities with respect to Federal Equity Jurisdiction.

In view of the importance of the phrase "equitable 'remedial rights' " used by the majority below to express the rationale of the decision, it is pertinent to seek the origin of the phrase. It seems to have been employed twice only; viz. in a sentence of Brandeis J. in *Pusey & Jones Co.* v. *Hanssen* 261 US 491, 497, which Douglas J. quoted in *Kelleam* v. *Maryland Casualty Co.* 312 US 377, 382, and in the opinion of Hughes C.J. in *Henrietta Mills* v. *Rutherford County* 281 US 121, 127. Each of the three opinions in which the term "remedial rights" appears uses it unmistakably to denote remedies, practice and procedure, Hughes C.J. referring in so many words to the distinction "clearly established between substantive and remedial rights". Other

employment of the phrase by this Court in any opinion we have not been able to find: The great stream of authority has dealt distinctly *either* with equitable remedies *or* with substantive rights in equity; and has, as appears to us, clearly discriminated between the two. Some cases decided before 1938, when a nicer discrimination in the employment of terms had not yet been rendered important by the rule of *Erie R. Co.* v. *Tompkins*, have employed the phrase or concept "Federal equity jurisdiction" in so broad a way as to give rise to the present confusion.

An analysis of the cases particularly with reference to the concept of equity jurisdiction involved in each, will show that they may be readily classified as between procedure and substance; that generally such part of the Federal equity jurisdiction as relates to practice in equity has been held independent of State decision and legislation; that the authorities upon which the decision below primarily rests offend against the rule of *Erie R. Co.* v. *Tompkins* and have been over-ruled; while a number of decisions even prior to 1938 have recognized the dependence of the Federal courts upon the substantive law of the States in matters lying outside the Constitution and acts of Congress.

The concept of Federal equity jurisdiction has been variously employed to mean (1) the right of the court to hear the case, (2) the manner of hearing in so far as it relates to procedure not decisive of the issue, or (3) matters determinative of the issue whether or not procedural in form.

1. *Federal equity jurisdiction conceived as the Court's right to hear the case.*

Some of the authorities which in this and other connections have been cited as supporting the exclusiveness of the

Federal equity jurisdiction with respect to other matters have dealt merely with the question whether a Federal court of chancery could exercise the rights given it by Congress under the Constitution. As expressed in the Judiciary Act of 1789 §11; 28 USC §41 (1), this grant of power was as follows:

> "Original jurisdiction. The district courts shall have original jurisdiction as follows:
>
> (1) United States as plaintiff; civil suits at common law or in equity. First. Of all suits of a civil nature, at common law or in equity, . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and . . . is between citizens of different States . . .

Some cases cited on the general question of the extent or nature of Federal equity jurisdiction deal only with the application of the power thus conferred:

> *Payne* v. *Hook* 7 Wall. 425,429.
> (1868: bill in a diversity case sustained notwithstanding existence of adequate remedy in Missouri court of probate)
>
> *Pennsylvania* v. *Williams* 294 U. S. 176
> (1935: jurisdiction with respect to receivership of a Pennsylvania corporation directed to be remitted to the State court; distinction between jurisdiction of a Federal court as such and the propriety of its action as a court of equity pointed out at p. 181)

Waterman v. *Canal-Louisiana Bank* 215 US 33

(1909: bill for relief with respect to property under administration in a State probate court where no attempt was made to set aside the probate or interfere with the possession; dicta at p. 43 with respect to historic basis of Federal equity jurisdiction and relative effect of State legislation establishing courts of probate).

Other cases referred to as illustrating Federal equity jurisdiction deal in reality with the division of the Federal jurisdiction between the equity and the law sides. Such are:

U. S. v. *Howland* 4 Wheat. 108

(1819: jurisdiction of the Circuit Court on a bill by the Government to collect taxes sustained; notwithstanding the availability of an adequate remedy at law in the State court by virtue of a state statute; dicta at p. 115 with reference to the uniformity of Federal chancery jurisdiction and powers);

In re Sawyer 124 US 200

(1888: Federal equity court *held* without jurisdiction to stay criminal proceedings brought by the mayor and council of Lincoln, Nebraska);

Matthews v. *Rodgers* 284 US 521

(1932: bill to enjoin as unconstitutional collection of a state tax with respect to which an adequate remedy existed in the

law of the State; statement at p. 529 with reference to the effect of State legislation on remedies in Federal courts of equity);

Stratton v. *St. Louis Southwestern R. Co.* 284 US 530
(1932: same question);

Di Giovanni v. *Camden Fire Insurance Association* 296 US 64
(1935: bill in equity to cancel insurance policies *held* not to lie where the State courts provided a remedy at law).

These and similar cases, while the opinions often contain general language, deal with equity jurisdiction either as a phase of the court's right to try the controversy between the parties or as a measure of the remedy available in equity as against the remedy available at law. As was stated in the *Di Giovanni* case at p. 69:

> "It is true, as this Court has often pointed out, that the inadequacy prerequisite to relief in a federal court of equity is measured by the character of remedy afforded in federal rather than in state courts of law. See *Henrietta Mills* v. *Rutherford County* 281 U. S. 121; *Smyth* v. *Ames*, 169 U. S. 466; *Risty* v. *Chicago, R. I. & P. Ry. Co.*, 270 U. S. 378. This follows from the nature of 'equity jurisdiction' of the federal courts. Whether a suitor is entitled to equitable relief in the federal courts, other jurisdictional requirements being satisfied, is strictly not a question of jurisdiction in the sense of the power of a federal court to act. It is a question only of the merits; whether the case is one for the peculiar type of relief which a court of equity

is competent to give. See *Pennsylvania* v. *Williams*, 294 U. S. 176, 181, 182. If a plaintiff is entitled to be heard in the federal courts he may resort to equity when the remedy at law there is inadequate, regardless of the adequacy of the legal remedy which the state courts may afford."

2. *Federal equity jurisdiction conceived as affecting the manner of hearing as to procedure only.*

The great bulk of the authorities which are cited as illustrating the independence of Federal courts of equity with respect to "remedial rights" are in reality limited to procedural matters not in themselves decisive of the issue. Such are:

Boyle v. *Zacharie* 6 Pet. 648

(1832: on motion to quash execution *held* that an injunction in equity does not operate as a supersedeas notwithstanding a statute of Maryland to that effect; statement by Story J. at p. 658 with respect to uniformity of practice in Federal equity, including dictum as to uniform "rules of decision");

Whitehead v. *Shattuck* 138 US 146

(1891: provision in Iowa Code with respect to quieting title to real estate *held* not to enlarge the Federal equity jurisdiction where plaintiff has an adequate remedy at law in Federal courts);

Scott v. *Neely*, 140 US 106

(1891: Federal equity court *held* not empowered to enforce claim of simple con-

tract creditor merely on basis of State statute since an adequate remedy at law exisits in Federal courts);

Dodge v. *Tulleys* 144 US 451
(1892: on foreclosure of security for a loan *held* that attorney's fees in Federal equity cannot be limited by State law);

Cates v. *Allen*, 149 US 451
(1893: same holding).

Mississippi Mills v. *Cohn* 150 US 202
(1893: creditor's bill to reach property of debtor *held* not to be impaired by existence of remedy at law in the State courts; dicta at p. 205 with respect to independence of Federal equity jurisdiction as regards State statutes);

Pusey & Jones Co. v. *Hanssen* 261 US 491
(1923: form of receivership permitted by Delaware statute *held* inadmissible in Federal equity; discussion at pp. 497-9 of remedies concerning which the Federal courts have exclusive control as against rights which may be created by the States);

Henrietta Mills v. *Rutherford County* 281 US 121
(1930: State statute authorizing proceeding in the State court for an injunction *held* not applicable in Federal equity; statement at pp. 127-8 as to difference between rights

and remedies created by States with respect to enforcement in Federal courts);

Gordon v. *Washington* 295 US 30
(1935: receivership in Federal court of assets of Pennsylvania corporation *held* not properly created as an end in itself apart from ultimate relief available in Federal court; statement at pp. 36-7 with respect to distinction between jurisdiction of court as a Federal court and jurisdiction in equity);

Atlas Life Insurance Co. v. *Southern, Inc.* 306 US 563
(1939: certificate from Tenth Circuit Court of Appeals dismissed for inadequacy; statement at p. 568 as to difference between Federal jurisdiction and equity jurisdiction);

Sprague v. *Ticonic National Bank* 307 US 161
(1939: allowance of counsel fees and expenses *held* to lie within historic equity jurisdiction of Federal courts embracing the remedies, procedures and practice which had been evolved in the English Court of Chancery);

Kelleam v. *Maryland Casualty Co.* 312 US 377
(1941: receivership in Federal court with respect to matters involved in State probate court *held* improvident; statement at p. 382 that Federal remedies cannot be enlarged by State statutes).

Plainly, all these cases deal with remedies and with practice in the Federal equity jurisdiction, as distinguished from substantive rights therein. The decisions are based upon the Act of May 8 1792, 28 USC §723, providing in part:

> ". . . the forms and modes of proceeding in suits of equity . . . in the district courts shall be according to the principles, rules, and usages which belong to courts of equity . . . except when it is otherwise provided by statute or by rules of court."

The real question in many of these cases is whether the matter under review constitutes a substantive right as to which State legislation or decision may control, or a part of the historic remedies and practices of equity. This distinction is nowhere better pointed out than in the opinion of Brandeis J. in *Pusey & Jones Co.* v. *Hanssen* 261 US 491, 497-9. He there uses the phrase "remedial right" to mean remedy as against substantive right, as does Hughes C.J. in the *Henrietta Mills* case (quoted at p. 42 below). But none of these decisions nor the others cited create thereby any confusion between rights and remedies. The words of Brandeis J. are taken into the opinion of Douglas J. in *Kelleam* v. *Maryland Casualty Co.* 312 US 377, 382. In the *Atlas* case this Court, after referring to Judiciary Act §11, 28 USC §41 (1), said (306 US at 568):

> "The 'jurisdiction' thus conferred on the federal courts to entertain suits in equity is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries. *Payne* v. *Hook*, 7 Wall. 425, 430; *In re*

Sawyer, 124 U. S. 200, 209-210; *Matthews* v. *Rodgers*, 284 U. S. 521, 525; *Gordon* v. *Washington*, 295 U. S. 30, 36. This clause of the statute does not define the jurisdiction of the district courts as federal courts, in the sense of their power or authority to hear and decide, but prescribes the body of doctrine which is to guide their decisions and enable them to determine whether in any given instance a suit of which a district court has jurisdiction as a federal court is an appropriate one for the exercise of the extraordinary powers of a court of equity. See *Massachusetts State Grange* v. *Benton*, 272 U.S. 525, 528; *Pennsylvania* v. *Williams*, 294 U.S. 176, 181, and cases cited."

This statement related solely to the question as determining the propriety of exercise of Federal equity jurisdiction as against jurisdiction at law. Both from the context and from the authorities cited, it seems clear that the Court's reference to the jurisdictional statute as prescribing "the body of doctrine which is to guide their decisions" was directed to the *practice* in equity with reference to the availability of equitable relief on given facts, and was not intended to fix the *substantive content* of equity jurisdiction with respect to the kind and nature of the relief to be granted.

3. Federal equity jurisdiction conceived as embracing matters determinative of the issue.

The following cases, in so far as they refuse to apply State substantive law on the ground of the supposed independence of the Federal equity jurisdiction, have necessarily been overruled by *Erie R. Co.* v. *Tompkins*:

Robinson v. *Campbell* 3 Wheat. 212
(1818: Equitable defense under Tennessee law to an action of ejectment *held* unavailable, in part because the titles in question were derived from Virginia grants; dictum at pp. 222-3 relates to uniformity of remedies in the Federal courts according to the principles of common law and equity);

Livingston v. *Story* 9 Pet. 632, 655-7
(1835: on a bill to set aside a conveyance *held* that the failure of the State courts to recognize equitable claims or rights did not alter the equity jurisdiction of the Federal courts);

Clark v. *Smith*, 13 Pet. 195, 203
(1839: on a bill to compel release of a claim of title *held* that the Federal courts should enforce a State-created right if consistent with the ordinary modes of proceeding in chancery);

Neves v. *Scott* 13 How. 268
(1851: on a question of construction of marriage articles executed in Georgia *held* that the court is not bound by relevant decision of the Supreme Court of Georgia; statement at p. 272 regarding uniform application of principles of equity under the judicial power);

Kirby v. *Lake Shore etc. R. Co.* 120 US 130
(1887: on a bill for an accounting including charge of fraud *held* that the Circuit Court had erred in following the construction placed by the New York courts on New York statute of limitations [CPA §48 subd. 5], but that on the Court's construction of the New York statute the plaintiff was barred in any event; dicta at pp. 136-8 as to the independence of Federal equity jurisdiction);

Kuhn v. *Fairmont Coal Co.* 215 US 349
(1910: in an action of trespass on land *held* that, even with reference to real estate, it is the right and duty of the Federal court to exercise an independent judgment where the law of the State had not been settled before the rights of the parties accrued);

Guffey v. *Smith* 237 US 101
(1915: on a bill for an injunction and accounting by holders of an Illinois oil lease *held* that the decisions of Illinois relative to the effect in equity of a surrender clause would not be followed in the Federal court);

Benedict v. *City of New York* 250 US 321
(1919: in a suit to enforce an accounting against the city *held* that while Federal equity courts are not bound by State statutes of limitations they are ordinarily

guided by them and plaintiff was barred by a delay of 17 years);

In the following cases decided before *Erie R. Co.* v. *Tompkins*, this Court has treated the substantive law of the State of the forum as providing the rule of decision, even though the reason for such treatment was not generalized until the decision in the *Erie* case:

Brine v. *Insurance Co.* 96 U. S. 627
(1877: on an action of foreclosure in a Federal court for Illinois *held* that the right of redemption granted by State statute is controlling; statements at pp. 634-639 with reference to the difference between rights and remedies);

Missouri, Kansas & Texas Trust Company v. *Krumseig*, 172 U. S. 351
(1899: on a bill to cancel a usurious contract *held* that the local law consisting of State statutes as construed by State courts furnishes the rule of decision);

Dupree v. *Mansur* 214 U. S. 161
(1909: on a bill to quiet title to land in Texas *held* that the Texas statute of limitations with reference to barring of the right to foreclose should be applied in a Federal equity court);

Mason v. *United States* 260 US 545, 557
(1923: in suits by the United States to confirm title to land in Louisiana *held* that

while the "jurisdiction" of Federal equity courts is uniform throughout the United States, rights in equity may properly be the subject of State legislation).

4. *Summary with respect to Foregoing Decisions.*

From a comparison of the decisions and dicta in the cases above cited, it is evident

(a) That this Court has consistently distinguished between rights and remedies in equity. One of the clearest statements is that in *Mason* v. *United States* 260 US at 557:

> "Subject to certain exceptions, the statutes of a State are binding upon the Federal courts sitting within the State, as they are upon the state courts. One of the exceptions is that these statutes may not be permitted to enlarge or diminish the Federal equity jurisdiction. [citations] That jurisdiction is conferred by the Constitution and laws of the United States and must be the same in all the States. [citations] But while the power of the courts of the United States to entertain suits in equity and to decide them cannot be abridged by state legislation, the rights involved therein may be the proper subject of such legislation."

Again in *Henrietta Mills* v. *Rutherford County* 281 US 121, in denying an injunction in the Federal court where an adequate remedy existed in the State court, Chief Justice Hughes pointed out the distinction (p. 127):

> "The contention is that the state statute authorizing a proceeding in the state court for an injunction created an equitable right which should be enforced in the Federal court. It is true that where a

> state statute creates a new equitable right of a substantive character, which can be enforced by proceedings in conformity with the pleadings and practice appropriate to a court of equity, such enforcement may be had in a Federal court provided a ground exists for invoking the Federal jurisdiction."

After stating the rule that the enforcement in the Federal courts of new equitable rights created by the States must be subject to the restrictions imposed by Congress in the Judiciary Act of 1789 §16, 28 USC §384, the Court continued:

> "Whatever uncertainty may have arisen because of expressions which did not fully accord with the rule as thus stated, the distinction with respect to the effect of state legislation, has come to be clearly established between substantive and remedial rights. A state statute of a mere remedial character, such as that which the petitioner invokes, can not enlarge the right to proceed in a Federal court sitting in equity, and the Federal court may, therefore, be obliged to deny an equitable remedy which the plaintiff might have had in a state court. *Pusey & Jones v. Hanssen, supra.*"

In 1839 the Court said in *Clark* v. *Smith* 13 Pet. at 203:

> "The state legislatures certainly have no authority to prescribe the forms and modes of proceeding in the Courts of the United States; but having created a right, and at the same time prescribed the remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the Chancery side of the federal Courts, no reason exists why it should not be pursued in the same form as it is in the state Courts; on the contrary, propriety and convenience suggest, that the practice should not materially differ, where

titles to lands are the subjects of investigation. And such is the constant course of the federal Courts."

And as late as 1939 this Court cited *Robinson* v. *Campbell*, *Boyle* v. *Zacharie* and *Payne* v. *Hook* for the proposition that the historic equity jurisdiction dating from the Judiciary Act of 1789 "constituted that body of remedies, procedures and practices which theretofore had been evolved in the English Court of Chancery, subject, of course, to modifications by Congress, *e.g.*, *Michaelson* v. *United States*, 266 U. S. 42." *Sprague* v. *Ticonic Bank*, 307 US 161, 164.

The employment by Brandeis J. in *Pusey & Jones* v. *Haussen* of the term "remedial rights" and the quotation of his phrase by Douglas J. by *Kelleam* v. *Maryland Casualty Co.*, was not intended to and did not obliterate the distinction between rights and remedies. In both those cases this Court dealt with equitable remedies and distinguished them from substantive rights. This distinction is drawn in so many words by the use of the phrase in the *Henrietta Mills* case.

(b) That the question what lapse of time shall be deemed in Federal equity jurisdiction to be conclusive as against rights asserted in equity, has always been considered to be a substantive question. It is so treated by Harlan J. in the *Kirby* case and by Brandeis J. in the *Benedict* case; both of which said by way of dictum, that the Federal courts were independent of State decisions on the subject; and it is so treated by Holmes J. in *Dupree* v. *Mansur* (1909). In this case, which was a bill to acquire title to land in Texas, the Court held the Texas statute of limitations applicable to a cross-bill which sought to enforce a

vendor's lien, and also applied the construction put by the Texas courts upon the Texas statute in that connection. In response to the argument that the statute of limitations does not govern equitable proceedings and that the Federal equity jurisdiction is independent of State law, Holmes J. said with reference to the Texas substantive right involved (214 US at 167):

> "But equitable or not it is a creation not of the United States, but of the local law of Texas. . . .
>
> We should add as an independent consideration that it cannot be admitted for a moment that for a debtor to rely upon the statute of limitation is inequitable of itself without some special circumstance wanting here. That would be for courts, and in this case courts of a different power, to undertake to declare wrong or discreditable what the proper authority, the legislature of the State, had declared right."

This holding strictly foreshadows the historic dissents of Holmes J. in *Kuhn* v. *Fairmont Coal Co.* 215 US at 370 (1910) and in *Black & White Taxicab Co.* v. *Brown & Yellow Taxicab Co.* 276 US 518, 532 (1928).

While the majority below seems to have understood by the phrase "remedial rights" a type of equitable relief which lay exclusively within the old chancery practice and was independent of State substantive law, we have already shown that in the three instances in which this Court has used the phrase it did not employ it in that sense, but in contra-distinction to substance or "substantive rights". Moreover it is not clear how the statute of limitations can be considered a "remedy" in any sense. The granting of "equitable relief" against the statute of limitations where

the law of the State of the forum would not grant it is, in diversity cases, a plain contravention of *Erie R. Co.* v. *Tompkins.*

(c) That even before 1938 a number of the decisions of this Court, as shown at pp. 40-1 above, recognized the dependence of the Federal equity jurisprudence upon State law. See particularly *Brine* v. *Insurance Co.* and *Missouri Kansas & Texas Trust Co.* v. *Krumseig* (p. 40 above).

(d) That in so far as the decisions of this Court prior to 1938 in dealing with matters determinative of the issue, i.e. with substantive questions, refused to follow State law upon the basis of the supposed independence of "Federal equity jurisdiction" in that respect, they have all now been overruled by *Erie R. Co.* v. *Tompkins*, 304 US 64, and *Ruhlin* v. *New York Life Insurance Co.*, 304 US 202.[14]

The now well-established doctrine of these cases has deprived of validity all the statements of law in the decisions of this Court anterior to 1938 asserting the independence of Federal courts of equity as regards the substantive law of the State of the forum. This is true whether the statements of law in question were necessary to the decision of the case or (as is the case for the most part)

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[14]The subsequent decisions in this Court applying the rule of *Erie R. Co.* v. *Tompkins* in Federal equity are listed in footnote 42 of the opinion below, R. 96, 143 F (2d) at 525. See also *Huddleston* v. *Dwyer*, 322 US 232. *D'Oench, Duhme & Co.* v. *F. D. I. C.*, 315 US 447, also discussed by the majority below in footnote 42 of the opinion, was not a diversity case, as particularly pointed out by this Court (pp. 455, 467).

were dicta unnecessary to the decision.[15] This conclusion, obvious on its face, necessarily applies to the expressions in the old cases relied upon by the majority below, such as:

> ". . . the courts of the Union have a chancery jurisdiction in every state, and the judiciary act confers the same chancery powers on all, and gives the same rule of decision . . . ." (*U. S.* v. *Howland* 4 Wheat. 108, 115).
>
> "The Chancery jurisdiction given by the Constitution and laws of the United States is the same in all the states of the Union and the rule of decision is the same in all." (*Boyle* v. *Zacharie* 6 Pet. 8, 658).
>
> "By the legislation of Congress and repeated decisions of this court it has long been settled that the remedies afforded and modes of proceeding pursued in the Federal courts, sitting as courts of equity, are not determined by local laws or rules of decision, but by general principles, rules and usages of equity having uniform operation in those courts wherever sitting. Rev. Stat. §§913, 917; *Neves* v. *Scott*, 13 How. 268, 272; *Payne* v. *Hook*, 7 Wall. 425, 430; *Dodge* v. *Tulleys*, 144 U. S. 451, 457; *Mississippi Mills* v. *Cohn*, 150 U. S. 202, 204." (*Guffey* v. *Smith* 237 US 101, 114.)

The discussion of these cases in the opinion of the Court of Appeals errs in failing to distinguish between substantive rights and equitable remedies, citing *Pusey & Jones* v. *Hanssen* and *Kelleam* v. *Maryland Casualty Com-*

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[15] The language of the two cases prior to 1938 on which the majority below relied for its conclusions, viz. *Kirby* v. *Lake Shore etc. R. Co.* 120 US 130 and *Benedict* v. *City of New York* 250 US 321, was dictum only.

pany as if they dealt with substantive rights, and treating the phrase "remedial rights" as if it erected a new category of jurisprudence independent of both procedure and substance. Particular attention is called to the language of the Court below in distinguishing *Ruhlin* v. *New York Life Insurance Co.*, to the effect that "the opinion did not . . . discuss the question whether, the substantive rights being settled according to state decisions, the federal court should grant equitable relief of a kind other than that granted in the state court" (R. 95-6, 143 F. [2d] at 525). This conception of the Federal court's granting "equitable relief of a kind other than that granted in the State courts" refers clearly to substantive law. A Federal court of equity cannot grant relief *of a kind other than that* granted by the State courts, on the same facts, without re-establishing the dual legal system which existed before 1938. In *Erie R. Co.* v. *Tompkins* 304 U. S. 64, 78, this Court held that, except in matters governed by the Constitution or by act of Congress, the law to be applied in any case is the law of the State; and that *there is no constitutional warrant in a case based purely upon diversity of citizenship for the application of any other law.*

C. *Kirby* v. *Lake Shore & Michigan Southern Railroad* 120 U. S. 130 (1887).

The opinion of this Court was written by Harlan J., whose opinion in *Kuhn* v. *Fairmont Coal Co.* (1910) 215 U. S. 349, evoked the dissent of Holmes J. The action was brought in the Circuit Court for the Southern District of New York by the executor of the partner of a firm which had had transactions in the shipment of livestock with various railroads, and was for a decree to set aside settlements

of accounts between the firm and the railroads on the ground that they were based on fraudulent misstatements as to the applicable rates. Plaintiff sought an accounting and a decree for the difference. The agreement governing the transactions took effect June 10 1870 and was to continue in force for a year. The plaintiff claimed that the frauds were not and could not have been discovered until April 16 1873, and the suit was brought April 9 1880. The New York Code of Civil Procedure then in force contained a provision similar to the present Civil Practice Act §48, subd. 5, to the effect that a cause of action to procure a judgment on the ground of fraud is not deemed to have accrued until discovery of the facts.

The only difference between the Circuit Court and the Supreme Court was that the Circuit Court in applying the statute conceded itself to be bound by the construction thereof by the New York Court of Appeals in *Carr v. Thompson*, 87 N. Y. 160; whereas this Court acknowledged no such restriction. In the first place Harlan J. suggested that the New York Court of Appeals itself might not apply *Carr v. Thompson* to the facts involved in the *Kirby* case.

In the second place the Court went on to say, purely by way of dictum, that relief on the ground of actual fraud, especially if concealed, is a separate head of equity jurisdiction as to which the Federal courts are independent of State law. At p. 137 Harlan J. said:

> "While the courts of the Union are required by the statutes creating them to accept as rules of decision, in trials at common law, the laws of the several states, except where the Constitution, laws, treaties, and statutes of the United States otherwise provide, their jurisdiction in equity cannot be impaired by the

local statutes of the different states in which they sit."

After quoting *United States* v. *Howland* 4 Wheat. 108 and *Payne* v. *Hook* 7 Wall. 425, and citing other cases which have been discussed above, Harlan J. continued (p. 138):

"In view of these authorities, it is clear that the statute of New York upon the subject of limitation does not affect the power and duty of the court below—following the settled rules of equity—to adjudge that time did not run in favor of defendants, charged with actual concealed fraud, until after such fraud was or should, with due diligence, have been discovered. *Upon any other theory the equity jurisdiction of the courts of the United States could not be exercised according to rules and principles applicable alike in every state.* It is undoubtedly true, as announced in adjudged cases, that courts of equity feel themselves bound, in cases of concurrent jurisdiction, by the statutes of limitation that govern courts of law in similar circumstances, and that sometimes they act upon the analogy of the like limitation at law. But these general rules must be taken subject to the qualification that *the equity jurisdiction of the courts of the United States cannot be impaired by the laws of the respective states* in which they sit. It is an inflexible rule in those courts, when applying the general limitation prescribed in cases like this, to regard the cause of action as having accrued at the time the fraud was or should have been discovered, and thus withhold from the defendant the benefit, in the computation of time, of the period during which he concealed the fraud." (Italics supplied.)

The foregoing language, which expresses the rationale of the Circuit Court's decision herein, was dictum because

Harlan J. concluded by holding that in any event more than six years had elapsed since the admitted discovery of the facts, and that this delay barred the action. Apparently the Court did not even inquire whether plaintiff was guilty of "gross laches" (120 US at 139) but simply applied the New York statute of limitations.

In *Benedict* v. *City of New York* 250 US 321 where this Court applied the doctrine of laches on the ground of the lapse of 17 years between repudiation of the trust and commencement of suit, Brandeis J. likewise said by way of dictum, citing the *Kirby* case, that Federal courts sitting in equity are not bound by State statutes of limitation (p. 327).

If these passages from the *Kirby* and *Benedict* cases on which the decision below was founded were still law, it might be possible to say that they were in no way necessary to the decision in the case and this Court is not bound by them (cf. footnote 48a of the opinion below; R. 99; 143 F[2d] at 527). In fact, however, the mere perusal of the passages quoted shows that they have not survived *Erie R Co.* v. *Tompkins* and are no longer law; they partake of that very concept of a uniform and independent Federal equity jurisprudence which, for diversity cases, the *Erie* and *Ruhlin* doctrine has destroyed.[16]

D. *Russell* v. *Todd* 309 U. S. 280 (1940).

The Court of Appeals supported its interpretation of the *Kirby* case by this Court's decision in *Russell* v. *Todd*,

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[16]The *Kirby* case has not since a date before *Erie R. Co.* v. *Tompkins* been cited either by this Court or by any Circuit Court of Appeals with two exceptions only, viz. in *Russell* v. *Todd* and in the opinion of the Circuit Court of Appeals herein.

which the Court below thought cited the *Kirby* case "with approval" (R. 98, 143 F[2d] at 526).[17] *Russell* v. *Todd* was an action in equity under the Federal Farm Loan Act to enforce against stockholders of a joint stock land bank a remedy by assessment which this Court held to be exclusively equitable (p. 286). The Second Circuit Court of Appeals, also holding the action to be exclusively equitable, had applied the doctrine of laches and refused application of the New York three-year statute of limitations, Civil Practice Act §49. The action was brought more than three and less than four years after the cause of action accrued. The essential holding of this Court was that it did not appear with reasonable certainty that the three-year statute would be applied by the State courts to like causes of action; that the ten-year statute did apply; and that the Court below rightly gave judgment for the plaintiffs upon finding that the cause of action was not barred by laches (pp. 293-4). Since laches had not been found to be a defense and the Court had not declined to give effect to a State statute shown to be applicable, this Court concluded that under the circumstances it had (p. 294)

> "no occasion to consider the extent to which federal courts, in the exercise of the authority conferred upon them by Congress to administer equi-

[17] The original theory of the Court below was that the statement in *Russell* v. *Todd* "The Rules of Decision Act does not apply to suits in equity" made the doctrine of *Erie R. Co.* v. *Tompkins* inapplicable to questions of limitations in equity (R. 53). In the revised opinion, however, the Court below acknowledged that the sentence quoted did not have the significance supposed, since the Rules of Decision Act has been held to be merely declaratory of the pre-existing rule in equity as well as at law (R. 90, 143 F. [2d] at 522, citing *Mason* v. *United States*, 260 U. S. 545, 559).

table remedies, are bound to follow state statutes and decisions affecting those remedies."

How then did the Court below come to consider *Russell* v. *Todd* as authority for its view? From the opinion (R. 93-4) it would seem that the Court below took this Court's discussion of the historical background as being an announcement of present-day legal principles. The passage on which the Circuit Court primarily relied was clearly marked as a review of the authorities. It introduced the English cases and early cases in this Court with phrases like the following (pp. 287-8):

> "From the beginning, equity, in the absence of any statute of limitations made applicable to equity suits, has provided its own rule of limitations . . . and the English Court of Chancery early adopted the rule, followed in the federal courts, that suits . . . In federal courts of equity the doctrine of laches was early supplemented by the rule that . . ."

Particular importance is given by the Court below to the footnote at p. 288 of this Court's opinion, which footnote also relates to the historical review of the cases and which cites the *Kirby* case.

On the other hand the Court below ignored the following statement at p. 289, in connection with which the *Kirby* case was also cited:

> "But where the equity jurisdiction is exclusive and is not exercised in aid or support of a legal right, state statutes of limitations barring actions at law are inapplicable, and *in the absence of any state statute barring the equitable remedy in like cases*, the federal court is remitted to and applies the doctrine of laches as controlling [citations]". (Italics ours);

and the following statement at p. 290:

> "The present suit being, as we have seen and as the court below held, exclusively of equitable cognizance, in that it is not predicated upon any legal cause of action, the statute is not one which a federal court of equity will adopt and apply as a substitute for or a supplement to its own doctrine of laches, *unless it is applied to like causes of action in the state courts*" (Italics ours);

and the following statement at p. 293:

> "We take it that in the absence of a controlling act of Congress *federal courts of equity*, in enforcing rights arising under statutes of the United States, will without reference to the Rules of Decision Act, *adopt and apply local statutes of limitations* which are applied to like causes of action by the state courts. Cf. Mason v. United States, 260 US 545; Jackson County v. United States, 308 US 343" (Italics ours).

These three sentences from the opinion of this Court seem to us not only much more important as an expression of opinion than the text of the footnote summarizing some pre-1938 cases, but also a reasonably clear indication that the statute of limitations of the forum must be applied in equity in a diversity case where it is shown with reasonable certainty that the statute would be applied by the State court in a like case. We find it extraordinary that the majority below does not discuss these sentences, much less give any effect to them—a fact made more striking because the same Court previously applied the New York six-year statute of limitations to an action claimed by plaintiffs to be of equitable cognizance, with the statement:

> "As Russell v. Todd shows, the court was ready to accept an explicit applicable state statute to a suit of exclusively equitable cognizance, and further held that a suit even of an equitable nature brought in aid of a legal right follows the state statute of limitations as to such right . . ."

Shiltz v. *Manufacturers & Traders Trust Co.*, 128 F. (2d) 889. This Court denied certiorari, 317 U.S. 674.

Other Circuit Courts of Appeals which have applied the State statute of limitations in equity cases, sometimes with citation of *Russell* v. *Todd*, are:

Roos v. *Texas Co.* 126 F. (2d) 767, 768 (C.C.A. 5, 1942);

Isaacks v. *Jeffers* 144 F. (2d) 26, 28 (C.C.A. 10, 1944);

Sanders v. *Louisville & N. R. Co.* 144 F. (2d) 485, 486 (C.C.A. 6, 1944);

Schram v. *Poole* 97 F. (2d) 566, 572 (C.C.A. 9, 1938);

Ganchoff v. *Home Owners Loan Corporation* 52 F. Supp. 349, 350, aff'd 142 F. (2d) 677 (C.C.A. 7, 1944);

Dixie Margarine Co. v. *Schaefer* 139 F. (2d) 221, 224 (C.C.A. 6, 1943).

Thus six circuits have approved or have acted on the interpretation of *Russell* v. *Todd* here contended for.[18] In *Hochn* v. *Crews* 144 F. (2d) 665 (C.C.A. 10, 1944) the

[18] Respondent's previous discussion of the cases in the Circuit Courts of Appeals has missed the point. Of the cases cited by her in the brief in opposition to certiorari (pp. 19-20) only *Robinson* v. *Linfield College* dealt with the statute of limitations, and some were not even diversity cases.

Court applied the doctrine of laches, but noted that the Oklahoma decisions were in accord. In *Robinson* v. *Linfield College* 136 F. (2d) 805 (C.C.A. 9, 1943) the Court indicated doubt as to the effect of *Russell* v. *Todd* but held the action to be barred. In *Borserine* v. *Maryland Casualty Co.* 112 F. (2d) 409, 416 (C.C.A. 8, 1940) the Court said that Federal courts sitting in equity are not bound by State statutes of limitations, but the suit was brought within the time permitted by the Missouri statute and *Russell* v. *Todd* is not mentioned. In *Committee for Holders of Central States Electric Corporation, etc.* v. *Kent* 143 F. (2d) 684 (C.C.A. 4, 1944), the Court intimated doubt whether statutes of limitation would be followed in a Federal court of equity, but did not discuss the question.

Conclusion

The New York statute of limitations as it would be applied to like cases by the State courts, is a complete defense to the action, and the Court below has erred in not applying it.

The order and judgment of the Second Circuit Court of Appeals should be reversed and the judgment of dismissal in the District Court affirmed on the ground of the New York statute of limitations.

Respectfully submitted,

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